Filed 2/10/09 In re R.P. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re R.P., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. R.S., Defendant and Appellant.	G040509 (Super. Ct. No. DP013912) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Barbara Evans, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

* * *

R.S. (father) appeals from the juvenile court's order terminating his parental rights and freeing his son R.P. for adoption. He challenges the sufficiency of the evidence to support the juvenile court's refusal to apply the "continuing benefit" exception to termination of parental rights to his son. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i), all statutory citations to this code unless noted; see former § 366.26, subd. (c)(1)(A).) He also contends the Orange County Social Services Agency (SSA) and the juvenile court failed to comply with the inquiry provisions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. [ICWA].) For the reasons expressed below, we affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2006, authorities took three-month old R.P. into protective custody after police officers arrested and jailed R.P.'s mother for theft. She had a long, unresolved history of substance abuse and related criminality. R.P.'s parents were unmarried and the alleged father's whereabouts were unknown.

Medical staff at Orangewood Children's Home examined R.P. and prescribed phenylbarbitol because of in utero drug exposure. SSA placed R.P. with his maternal grandmother the following day. SSA located father, a longtime methamphetamine abuser who had served a prison sentence for weapons violations, in a substance abuse rehabilitation program.

On October 5, 2006, the juvenile court sustained the allegations of a dependency petition, finding the parents failed to protect R.P. and left the child without any provision for support. (§ 300, subds. (b) & (g).) The court declared R.P. a dependent child, removed custody from the parents and adopted SSA's recommendations for

reunification services. R.P. was placed in the home of his maternal grandmother, Debbie P.

By November, father had completed his rehabilitation program, secured employment, and began residing with R.P.'s paternal grandmother. Mother had been released from jail into a six-month residential treatment program, and received monitored visitation with R.P. for three hours every Sunday beginning in December. The paternal grandparents began caring for R.P. on weekends, where he visited with his paternal half-sisters.

According to SSA's report for the March 2007 six-month review, the social worker noted escalating personality conflicts between mother and maternal grandmother. Mother, however, actively participated in her drug treatment program and had obtained employment. Father visited his son twice a month, monitored at the paternal grandparents' home.

At the six-month review hearing, the court ordered reunification services to continue and scheduled a 12-month permanency hearing for August. The court also found father to be R.P.'s presumed father and formally offered him a reunification case plan.

In May 2007, mother graduated from her treatment program and took custody of her two-year-old daughter, who had been living in Illinois with her grandfather. Mother, pregnant again, struggled to maintain her sobriety, care for her daughter, and deal with pregnancy-related health problems. She allegedly was injured in a car accident and received a prescription for Vicodin without telling the social worker or staff at her sober living home, or mentioning her addiction to the prescribing physician. She was fired from her restaurant job and terminated from her sober living home when

supervising staff discovered the Vicodin pain medication in her room. She failed to report for drug testing and had not attended parenting classes.

She and father stated they would be moving in together so he could assist with her finances. The social worker warned father he would no longer have unmonitored visits with R.P. at the paternal grandparents' home because father previously had taken R.P. to visit mother without permission, although he knew SSA allowed mother only monitored visitation.

In late May, mother admitted she kept "thinking about using" and had become hooked on Vicodin. She wanted to start taking methadone again. The maternal grandmother reported mother had been cutting herself.

In June, mother called the police and reported father assaulted her, which he denied. The social worker referred father for individual counseling, and directed the parents to take separate parenting classes.

In August 2007, father seemed "overwhelmed with his current responsibilities . . . ." While working two jobs, he continued "participating in some aspects of his case plan." Father missed several drug tests, but all his completed tests were negative, and there was no indication he was abusing drugs. He had two overnight weekend visits with R.P. at the paternal great grandmother's residence, although the social worker had not approved her home for visits. According to the social worker, father had not maintained regular visits "as his efforts have primarily focused on maintaining employment to support the mother [and her daughter]."

Mother had telephoned the social worker and stated she felt "it was 'too much' for her to try to parent" R.P. with her other problems and conceded R.P. would be better off with father or the maternal grandmother. Mother's living arrangements

continued to remain unsettled as she relapsed into her drug addiction. In early September, father informed the social worker he had not signed up for domestic violence classes because he helped mother move to a sober living home. Father admitted reuniting with mother, and acknowledged she was associating again with friends who abused drugs. Father believed mother would file a false report accusing him of domestic violence. Concerned about their relationship, the social worker directed father to leave mother's residence to avoid a confrontation.

On September 18, 2007, mother was arrested for violating probation after being discharged from her drug treatment program and abusing prescription medication. Officials took her daughter into protective custody. The social worker directed father to have no contact with mother, who had been released by her probation officer to seek pregnancy-related medical care. Father agreed, stating he was focusing on R.P. On September 20, mother came to the paternal grandparents' home, announced she intended to give father custody of R.P. and the new baby, and take her daughter to Mexico.

Based on mother's numerous lapses, SSA recommended terminating mother's reunification services at the 12-month review, but recommended continuing reunification efforts for father. SSA explained he was "somewhat co-dependent of the mother," but had "taken a very active role in cooperating with all aspects of his case plan." The social worker noted he "has been participating in visitation with" R.P. At the September 24, 2007, 12-month review, the court terminated mother's reunification services and scheduled an 18-month permanency review, finding a substantial probability the court would return R.P. to father's care because father had consistently contacted and visited R.P., and had made significant progress in resolving the problems that led to R.P.'s removal.

In the period before the 18-month review, mother gave birth to a girl on January 18, 2007. The parents continued to have unauthorized contact with each other. Because father facilitated unauthorized contact between mother and R.P. and had unapproved visits with R.P. at his own residence, SSA reinstated a visitation monitor in early December 2007. Father missed weekend visits with R.P. He also failed to supply proof of attendance at recovery group meetings and did not maintain regular contact with the social worker. SSA observed the parents appeared enmeshed in a destructive, codependent relationship. Father did not acknowledge mother's mental health issues and chose to pursue a relationship with her to the detriment of his son. Father cried during a conversation with a social worker, explaining mother showed up at his house uninvited and he feared if he did not comply with her requests she would falsely accuse him of domestic violence, or that she would harm herself or their new child. Consequently, SSA recommended terminating father's reunification services and setting a hearing under section 366.26.

Father had agreed in December to obtain a restraining order against mother, but waited to the day of the 18-month review, February 11, 2008, to obtain the order. The parties stipulated to terminate father's reunification services and set a section 366.26 hearing. The court authorized SSA to begin a 60-day trial placement with father, if appropriate. The social worker authorized unmonitored visits at the paternal grandparents' residence.

On March 21, 2008, father was arrested and incarcerated for possessing a knife in violation of his parole. Father's roommate reported mother had been residing with them before father's arrest. After gaining his release from jail in May, father agreed to complete his domestic violence class, begin drug testing and resume visitation. The

social worker reminded him reunification services had been terminated, but authorized visitation, monitored by the grandmothers. Father denied having contact with mother, but later admitted he had seen her, explaining he could not control her actions. He also claimed she had been arrested and would receive a four-year prison sentence.

SSA deemed R.P. adoptable, and the maternal grandmother and caregiver had consistently expressed a desire to adopt him should reunification efforts fail. At the section 366.26 hearing held on June 11, 2008, the court found that despite some benefit to R.P. in maintaining contact with his father, he would not suffer detriment from the termination of father's parental rights.[1] The court characterized the contact as "beneficial in the same sense that having contact with a kind adult who pays attention is beneficial to a child. But that could be an uncle. It could be a neighbor. It could be any number of people. It could be a child care provider." The court found R.P. adoptable, and terminated parental rights.

II

DISCUSSION

A. *Substantial Evidence Supports the Juvenile Court's Termination of Parental Rights*

Father contends the evidence demonstrated R.P. suffered detriment from the termination of parental rights because father maintained regular visitation and contact with R.P. and the child would benefit from continuing their relationship. He emphasizes he had frequent and continuing contact with R.P. throughout the case, except for the two months he was incarcerated beginning in March 2008. Father concedes he has not served in a day-to-day parental capacity, but describes himself as a "weekend" or "visiting" father providing a positive influence as the only paternal figure in R.P.'s life. He argues

[1] Mother has not appealed. She agreed with the recommendation terminating parental rights, clearing the way for the maternal grandmother to adopt R.P.

legal guardianship with the maternal grandmother would protect the child, give her the control she needs to raise R.P. and also allow R.P. to enjoy a parental relationship with the only father figure he knows. We do not find father's argument persuasive. Substantial evidence supports the court's conclusion that termination of parental rights and adoption served R.P.'s best interests.

The benefit exception authorizes the juvenile court to avoid terminating parental rights if it finds "'termination would be detrimental to the child [because] . . . [t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.'" (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424 (*Cliffton B.*).)[2] Once a parent fails to reunify with a child during the prescribed statutory period and the juvenile court terminates reunification services, the parent bears the burden of proving termination of parental rights would be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).) The benefit exception does not permit a parent to thwart the permanency and stability of adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. (*Id.* at p. 1348.) Instead, the benefit exception applies only if "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).)

---

2 Effective January 1, 2008, the court need not terminate parental rights where the child is living with a relative who is unable or unwilling to adopt but is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and removal of the child from the relative would be detrimental to the emotional well-being of the child. Because the grandmother was willing and able to adopt, this exception did not apply here.

Autumn H. explains the requisite analytical framework: "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) Thus, "the juvenile court must engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family." (*Cliffton B., supra,* 81 Cal.App.4th at pp. 424-425.) Factors bearing on the parent-child bond include "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs. . . ." (*Autumn H., supra,* 27 Cal.App.4th at p. 576.)

Even if these factors reveal a strong bond, the parent faces a heavy burden to overcome the Legislature's preferred permanent plan of adoption. (See § 366.26, subd. (b)(1) [identifying adoption as preferred plan]; see also *Jasmine D., supra,* 78 Cal.App.4th at p. 1348 ["Adoption is the Legislature's first choice because it gives the child the best chance at [a full emotional] commitment from a responsible caretaker"]; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419 [the "most permanent and secure alternative" of adoption affords children "the best possible opportunity to get on with the task of growing up"].) Stability and permanence become paramount goals once reunification efforts cease. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) By the section 366.26 hearing, the dependent child "is entitled to stability now, not at some hypothetical point in the future." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 254.) Thus, the

statutory exceptions to termination, including the benefit exception, "merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) We review the juvenile court's conclusion concerning whether the benefit exception applies for substantial evidence. (*Autumn H., supra*, 27 Cal.App.4th at p. 576.)

Here, substantial evidence demonstrates father failed to maintain regular visitation and contact with R.P. Father did not visit for approximately three months after R.P.'s detention. He began to visit R.P. twice monthly, and then progressed to unmonitored visits. But beginning in December 2007, father began missing visits. Although father was entitled to visits every other weekend, the social worker and the grandparents characterized his visits as sporadic. SSA reinstated monitored visitation because father continued frequent contacts with mother. Father testified he took R.P. to church during every weekend visit. Because the evidence showed they had been to church only three times in 2008 before the June permanency hearing, the juvenile court could reasonably conclude father and R.P. visited infrequently. Moreover, father missed two months of visits after his arrest in March 2008, and at the time of the section 366.26 hearing father was not entitled to unsupervised visitation. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [parent's showing of requisite benefit "difficult to make" where he or she fails to qualify for unsupervised visitation].) In sum, substantial evidence shows father did not maintain regular visitation and contact with R.P.

Concerning the benefit prong, father testified two-year old R.P. called him "daddy." To demonstrate their close relationship, father described a visit that occurred the weekend before the section 366.26 hearing. Father picked up R.P. near the maternal grandmother's home, placed R.P. in his car seat, and drove to the paternal grandmother's

home. He conversed with R.P. during the ride, fixed a snack for him when they arrived and later bought R.P. a ball. Father described how he spent the weekend with R.P., which included playing ball and visiting with relatives and attending church. Father testified R.P. hugged him during their visits, and told father he loved him.

During his testimony, however, father could not initially recall R.P.'s birthdate. He was not sure if R.P. attended a daycare center or a babysitter cared for him during the day. He had met a babysitter on only one occasion, and did not recall her name. Father did not know the name of R.P.'s physician, and had never participated in taking R.P. to his pediatrician. Father minimized R.P.'s speech difficulties and other problems and felt he could handle these issues without professional help, although a delay in treatment would not have been in R.P.'s interest.

Father also minimized his criminal behavior. He claimed his latest jail stay resulted from "carrying a tool from work which was apparently a [probation] violation," and that he was on probation or parole for possession of "either cocaine or methamphetamine." He complained he had been arrested for carrying "empty bags" in his car and the police "never tested" the contents. Obviously, R.P. would not benefit having a parent incarcerated for breaking the law.

Father also minimized his repeated violation of SSA's directives concerning mother. He initially denied allowing mother contact with R.P., but then admitted "it just happened." Substantial evidence showed father could not end his tumultuous relationship with R.P.'s mother, and often exposed R.P. to mother's unsuitable influence.

Thus, the juvenile court could reasonably conclude the stability of a loving, permanent home outweighed the benefit of maintaining a legal relationship with father.

R.P. was placed with his grandmother shortly after his birth and enjoyed a close bond with her. He spent little or no time in father's physical custody. Interaction between R.P. and father had produced no discernible effect on R.P., either positive or negative, and father presented no evidence R.P. suffered any distress at the conclusion of their visits or while the father was in jail. In other words, father's contact had not led to the type of substantial, positive emotional attachment indicating R.P. would suffer harm if the court terminated father's parental rights. The evidence here falls far short of what is required on appeal to overturn the juvenile court's no-detriment findings under the benefit exception. (See *In re S.B.* (2008) 164 Cal.App.4th 289, 296; *In re Amber M.* (2002) 103 Cal.App.4th 681; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206; *In re Angelia P.* (1981) 28 Cal.3d 908, 924.) Substantial evidence supports the juvenile court's conclusion termination of parental rights would not cause R.P. detriment.

B. *The Juvenile Court and SSA Did Not Fail to Comply With Inquiry Provisions of the Indian Child Welfare Act*

Both parents told SSA that they did not have Native American heritage. SSA's detention report, the section 300 petition and all subsequent reports reflected ICWA did not apply. At the detention hearing, both parents denied Indian ancestry on the record in response to the court's question to mother whether she had "any American Indian heritage on your side of the family" and its query to father whether he had "any Native American Indian blood on your side of the family." The court found ICWA did not apply.

Father asserts the detention report's "terse statement" that father and mother denied "any Indian Heritage" does not reveal the details of SSA's inquiry. He argues there is no evidence SSA conducted "any further inquiry whatsoever" and notes SSA had ample opportunity to ask the maternal grandmother and the paternal

grandparents whether they were aware of any Indian heritage in their family. He contends the juvenile court compounded the error by failing to order the parents to complete a "Parental Notification of Indian Status" form (JV-130), which would have provided the court with definitive evidence of the parents' true understanding of their family history.

Congress passed ICWA to combat "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

"Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under [ICWA] irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421 (*Kahlen W.*).) Accordingly, ICWA requires notice to the child's Indian tribe of the dependency proceeding and of the tribe's right of intervention "where the court knows or has reason to know" the child is an Indian child. (25 U.S.C. § 1912(a); see also § 224.2, subd. (b).) "The circumstances that may provide reason to know the child is an Indian child include . . . : [¶] A person having an interest in the child . . . provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b).)

"Both the juvenile court and [SSA] have an affirmative duty to inquire whether a child declared a dependent minor of the juvenile court qualifies as an Indian child for ICWA purposes. [Citation.]" (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1449.) Court rules in effect at the time of R.P.'s detention imposed, and continue to impose, on the court and SSA an "affirmative and continuing duty to inquire whether a child for whom a petition under section 300 . . . has been filed is or may be an Indian child." (Former Cal. Rules of Court, rule 5.664(d); accord, rules 5.480 & 5.481(a); Welf. & Inst. Code, § 224.3, subd. (a).) The social worker is required to ask the parents "whether the child may be an Indian child or may have Indian ancestors." (Former rule 5.664(d)(2); rule 5.481(a)(1).) Further, "[a]t the first appearance by a parent . . . in any dependency case . . . the parent . . . must be ordered to complete the *Parental Notification of Indian Status* (*Juvenile Court)* (JV-130) form [now ICWA-020]." (Former rule 5.664(d)(3); rule 5.481(a)(2).)

The detention report reflects SSA complied with its duty to ask the parents whether they knew of any Indian heritage. Also, the court confirmed SSA's information by inquiring of the parents on the record at the detention hearing. SSA had no duty to pursue the issue with the grandparents. (*In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 942; see rule 5.481(a)(4)(A) [duty to consult with "'extended family members'" arises with reason to know the dependent child may have Indian ancestry].) Nothing suggests SSA or the court breached their continuing duties under ICWA. (See rule 5.481(a)(4)(A) [SSA's duty of "further inquiry" arises only when it "knows or has reason to know that an Indian child is or may be involved"]; see also Welf. & Inst. Code, § 224.3, subd. (f) [receipt of "new information" requires court and SSA to provide notice to appropriate tribes and Bureau of Indian affairs].)

Any error by the juvenile court in failing to order the parents to complete the JV-130 notification of Indian status form does not warrant reversal. Father concedes "absence" of the form "does not necessarily require reversal where the record shows that the court otherwise conducted an adequate inquiry." So it is here. As noted, the parents informed SSA there was no Indian heritage in their family and repeated that denial on the record at the detention hearing. No one raised the issue of Indian ancestry in the juvenile court at any point, and nothing in the record suggests R.P. had Indian ancestry. There is no reasonable basis to believe R.P. is an Indian child within the meaning of ICWA. (*In re O.K.* (2003) 106 Cal.App.4th 152.)

Relying on *In re J.N.* (2006) 138 Cal.App.4th 450 (*J.N.*), father asserts the trial court's failure to order the parents to complete the JV-130 form should not be deemed harmless. But unlike in *J.N.*, the trial court here inquired on the record whether mother or father had Indian ancestry. (Compare *J.N.*, *supra*, 138 Cal.App.4th at p. 461.) As we observed in *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413, the juvenile court's "obligation is only one of inquiry and not an absolute duty to ascertain or refute Native American ancestry." And "[u]nless the juvenile court has some further basis on which to predicate the belief a child is an Indian under the Act, the court is not required to make further inquiry." (*In re Levi U.* (2000) 78 CA4th 191, 198.) Here, the court fulfilled its inquiry duty and no subsequent developments revealed any basis for additional inquiry.

Father complains the phraseology of the court's inquiry ("do you have any Native American Indian blood on your side of the family") was "vague and ambiguous as to what 'blood' means." But a "hint" or "suggestion of Indian *ancestry*" (italics added) is the threshold that triggers the ICWA duty to notify tribes or the Bureau of Indian Affairs

of the dependent child's potential Indian status. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) Because ancestry is a matter of blood relation, the trial court's wording was pertinent and appropriately direct. (See, e.g., *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539 & fn. 4 [blood quantum determined child's eligibility for tribal enrollment].)

Father suggests the court's oral inquiry was insufficient because, unlike a written response on the JV-130 form, it was not taken under penalty of perjury. This is a distinction without a difference. First, the solemnity of in-court, on-the-record proceedings — backed by the court's contempt power — inherently conveys to the average parent the importance of truthfulness. Second and more importantly, father identifies no conceivable motive for a parent to lie to the court by *denying* Indian heritage. Consequently, the absence of perjury penalties is irrelevant.

III

DISPOSITION

The juvenile court's order terminating parental rights is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.